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Data Gathering and Analysis: The Anatomy of a Merger Investigation in Europe

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Gerwin Van Gerven and Melissa Gotlieb

Abstract

Ever since the early days of European merger control, the European Commission (“Commission”) has relied heavily on information provided by the notifying parties and by relevant third parties in carrying out its review of concentrations. More recently, the Commission has added economic analyses and market surveys, as well as the review of internal documents, as major elements. Over time, it is fair to say that the depth and breadth of the information gathering and analysis has grown significantly, making European merger review a resource-intensive and sometimes very drawn-out exercise. With that in mind, and after criticism from stakeholders, the Commission has in recent months sought to streamline and simplify the process. In December 2013, it adopted a package of measures to that effect (“Merger Simplification Package”), and has proposed some further measures in its White Paper “Towards more effective EU merger control,” published in July 2014. This paper provides a high-level view of the way in which the Commission carries out a merger investigation nowadays. In particular, we focus on four areas that are key to understanding the current anatomy of the fact-finding investigation. We also discuss the process through which, in certain cases, the Commission grants access to file through a “data room” procedure.

KEYWORDS: Market Test; European Commission; International law; Stop-the-clock; document production; Data Gathering; Data Analysis; Merger; Europe

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ESSAY

DATA GATHERING AND ANALYSIS: THE ANATOMY OF A MERGER INVESTIGATION IN EUROPE^μ

By Gerwin Van Gerven and Melissa Gotlieb***

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INTRODUCTION

Ever since the early days of European merger control,¹ the European Commission (“Commission”) has relied heavily on

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1. The first Merger Regulation was adopted in 1989. *See* Council Regulation 4064/89/EC on the Control of Concentrations Between Undertakings, 1989 O.J. L 395/1. It

information provided by the notifying parties and by relevant third parties in carrying out its review of concentrations. More recently, the Commission has added economic analyses² and market surveys, as well as the review of internal documents, as major elements. Over time, it is fair to say that the depth and breadth of the information gathering and analysis has grown significantly, making European merger review a resource-intensive and sometimes very drawn-out exercise.

With that in mind, and after criticism from stakeholders, the Commission has in recent months sought to streamline and simplify the process. In December 2013, it adopted a package of measures to that effect (“Merger Simplification Package”),³ and has proposed some further measures in its White Paper “*Towards more effective EU merger control*,” published in July 2014.⁴

This paper provides a high-level view of the way in which the Commission carries out a merger investigation nowadays. In particular, we focus on four areas that are key to understanding the current anatomy of the fact-finding investigation. We also discuss the process through which, in certain cases, the Commission grants access to file through a “data room” procedure.

I. *SUBMISSION OF NOTIFICATION: FORM CO OR SHORT FORM CO*

A. *Pre-Notification Contacts and Notification of a Concentration*

Concentrations that have a Union dimension are required to be notified to the Commission using an official notification form,

was replaced by an amended Regulation in 2004 after the first major overhaul. *See* Council Regulation 139/2004/EC on the Control of Concentrations between Undertakings, 2004 O.J. L 24/1 [hereinafter EUMR].

2. *See, e.g.*, OECD Policy Roundtable, Economic Evidence in Merger Analysis 245-60 (DAF/COMP(2011)23, July 27, 2012) [hereinafter OECD Policy Roundtable].

3. *See* Commission Regulation 802/2004/EC Implementing Council Regulation 139/2004/EC on the Control of Concentrations between Undertakings, 2004 O.J. L 133/1, amended by Commission Regulation 1033/2008/EC, 2008 O.J. L 279/3 and by Commission Implementing Regulation 1269/2013/EC, 2013 O.J. L 336/1 [hereinafter Implementing Regulation]; *see also* Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under Council Regulation 139/2004/EC, 2013 O.J. C 366/04 [hereinafter Notice on Simplified Procedure]. The Merger Simplification Package has been implemented through updates to the Implementing Regulation and the Notice on Simplified Procedure.

4. *See* European Commission, White Paper: *Towards More Effective EU Merger Control*, COM (2014) 449 Final (July 2014) [hereinafter White Paper].

referred to as a “Form CO.”⁵ Certain categories of concentrations are eligible for treatment under the so-called “simplified procedure,” including those that do not give rise to so-called affected markets.⁶ For this purpose, the notifying party may use a “Short Form CO,” which is less burdensome in terms of the information and data required.⁷ The rationale for this procedure is that a less in-depth review is required for transactions which are unlikely to raise any competition concerns. Since the Commission introduced it in 2000, the simplified procedure has been extensively used. At present, it is estimated to account for sixty to seventy percent of all notifications.⁸

The submission of a Form CO requires the provision of considerable information on the undertakings concerned by the concentration, the concentration itself, the relevant product and geographic markets, the conditions of competition in the affected markets (including the structure of supply and demand, the degree of product differentiation and closeness of competition, market entry and exit, the nature and importance of research and development, the existence of cooperative agreements, information on trade associations), and contact details. In addition, the Form CO specifies the supporting documentation that must be provided, of which Section 5.4 documents are of particular importance: Section 5.4 of the Form CO requires the submission of internal documents such as board presentations, surveys, analyses, reports and studies discussing the proposed concentration, the economic rationale for the concentration and competitive significance or the market context in which it takes place.⁹

Although not mandatory, it is standard practice for the parties and their advisors to engage in pre-notification contacts with the case team at Directorate-General for Competition (“DG Competition”) so as to determine, among other things, the exact scope of information to

5. The Form CO is set out as Annex I to the Implementing Regulation, *supra* note 3 [hereinafter Form CO].

6. Notice on Simplified Procedure, *supra* note 3, ¶¶ 5-6.

7. The Short Form CO is set out as Annex II to the Implementing Regulation, *supra* note 3 [hereinafter Short Form CO].

8. See Commission Press Release, Mergers: Commission Consults on Proposal for Simplifying under the EU Merger Regulation, IP/13/288, (Mar. 27, 2013) (mentioning that the proposed changes that were put in place later that year “could allow up to 70% of the all notified mergers to qualify for review under the Commission’s simplified procedure, i.e., about 10% more than today”).

9. See DG Competition’s Best Practices on the Conduct of EC Merger Control Proceedings, ¶ 17 (Jan. 2004) [hereinafter Merger Best Practices].

be submitted, thereby minimizing the risk of a decision of incompleteness.¹⁰ During pre-notification, the parties may seek to confirm whether the simplified procedure is available and whether information waivers can be obtained. Such waivers with regard to mandatory information requirements will be granted where “*the Commission considers that compliance with those obligations or requirements is not necessary for the examination of the case.*”¹¹ One purpose of the amendments adopted in December 2013 is to facilitate a wider use of waivers.¹²

B. Informational Burdens on the Notifying Parties

While the text of the notification forms had not undergone any material changes until the recent adoption of the Merger Simplification Package, in practice, the informational burdens have grown considerably over the years, together with a significant increase in the importance, scope and duration of the pre-notification phase. The following points are worth mentioning in that regard.

First, where there are complex issues of jurisdiction or substance, informal meetings and discussions between the merging parties and the Commission’s case team can stretch over an extensive period of time—from a few weeks to several months. Stakeholders have complained that sometimes even for cases qualifying for treatment under the simplified procedure, the pre-notification phase has been quite lengthy. This has changed lately as part of the December 2013 streamlining process. Indeed, the Notice on Simplified Procedure now acknowledges that:

[P]re-notification contacts, in particular the submission of a draft notification, may be less useful in cases . . . where there are no reportable markets since the parties are not engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product

10. See *id.* § 3 (regarding pre-notification contacts). The Merger Simplification Package has also provided clarifications on pre-notification contacts in the Introductory Part (point 1.2) of the revised Form CO [hereinafter Revised Form CO] and the Introductory Part (point 1.3) of the revised Short Form CO [hereinafter Revised Short Form CO].

11. See Implementing Regulation, *supra* note 3, art. 4(2).

12. See Revised Form CO, *supra* note 10, Introductory Part, point 1.4(g); see also Revised Short Form CO, *supra* note 10, Introductory Part, point 1.6(g).

market in which any other party to the concentration is engaged.¹³

Second, the amount and level of detail of the information requests from the case team during pre-notification discussions have considerably increased. By way of example, the Commission may ask for internal documents going back several years, which can prove to be a burdensome exercise for the notifying parties. The officials may ask for sales and market share data over many years under a number of market definition alternatives. It is also not unusual for the Commission to ask for far more contact details than is requested in the Form CO. In more complex cases, the Commission will encourage the notifying party, and it will be in that party's interest, to provide a detailed competitive analysis for each of the "most affected" markets. This may lead to several drafts of the notification form being submitted as a result of requests for clarification and/or additional questions from the case team—which itself may already be in contact with interested third parties about possible concerns raised by the proposed transaction.

Third, a further testimony of the increased informational burdens borne by the notifying parties lies in the length of the final version of Form CO documents nowadays. While our experience shows that in the 1990s, the length of notification forms submitted to the Commission was rarely over 200 pages (and in the early 1990s, less than 100 pages), in recent years, Form COs have sometimes exceeded 500 pages and may be supplemented by many "work product" annexes to be prepared by the notifying party.

C. The Merger Simplification Package

The Commission's revisions under the Merger Simplification Package, which entered into force on January 1, 2014, encompass a series of revised documents, including a revised Notice on Simplified Procedure and amendments to the Implementing Regulation. The aim of the Merger Simplification Package is to simplify the Commission's merger review procedure in three ways: (i) by expanding the scope of the simplified procedure, the net effect of which is expected to increase the number of notifications eligible for simplified treatment from around sixty percent in 2013 to around seventy percent in the future; (ii) by reducing the information burden on the parties more

13. Notice on Simplified Procedure, *supra* note 3, ¶ 23.

generally, including in cases notified using the standard Form CO; and (iii) by streamlining the pre-notification process.¹⁴

The revisions made to the Forms annexed to the Implementing Regulation consist primarily in streamlining the information requirements for notifying mergers. These changes include an increase in the market share thresholds for so-called “affected markets” (from fifteen percent to twenty percent for horizontal overlaps, and from twenty-five percent to thirty percent for vertical relationships),¹⁵ the aim of which is to reduce the number of markets that are defined as “affected” and thus require a detailed description or a full Form CO. Reductions in certain sections of the revised Form CO also include the removal of the requirement to provide Herfindahl-Hirschman Index (“HHI”) calculations. Other revisions aim to simplify the procedural and/or informational requirements in certain circumstances where the previously more burdensome treatment was not warranted. In particular, a “super-simplified notification” procedure is introduced in relation to joint ventures that do not have activities in the European Economic Area (“EEA”).¹⁶ Under the White Paper adopted in July 2014, the Commission is even providing to exempt such joint ventures from notification to the Commission.¹⁷

Further, the Commission has included in the revised Form CO additional references to categories of information for which, based on the Commission’s experience, it may be appropriate to submit, in pre-notification, a written request for a waiver. Such categories are as follows: data on participations in other undertakings, details of past acquisitions of undertakings, categories (ii) and (iii) of section 5.4 documents, requested information for certain affected markets or for certain other markets in which the notified operation may have a significant impact, value or volume-based data for market size and shares, capacity data, details of cooperative agreements, and contact details for trade associations.¹⁸

However, the Merger Simplification Package also includes amendments that may increase the informational burdens on the

14. See Commission MEMO/13/1098, *Mergers: Commission Adopts Package Simplifying Procedures under the EU Merger Regulation, Frequently Asked Questions* (Dec. 5, 2013) [hereinafter Commission MEMO/13/1098].

15. Revised Form CO, *supra* note 10, § 6.3.

16. Revised Short Form CO, *supra* note 10, § 8.

17. See White Paper, *supra* note 4, ¶ 77.

18. Revised Form CO, *supra* note 10, nn.15, 16, 18, 20, 23, 27, 28, 30, 31.

parties, although admittedly these changes codify what has become best practice in recent years. The following points are particularly noteworthy in that regard.

First, the Commission has expanded the scope of the requirement to provide supporting documents in the revised Form CO. In particular, Section 5.4 now refers to additional categories of documents to which access must be given: (i) minutes of the board and shareholders' meetings at which the transaction has been discussed; (ii) board and shareholder documents where the transaction is discussed in relation to potential alternative acquisitions;¹⁹ and (iii) board and shareholder documents from the last two years that assess any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. A requirement to submit internal documents is now also introduced into the revised Short Form CO in relation to cases that give rise to horizontal and/or vertical relationships between the merging companies. Further, notifying parties will now need to provide copies of documents prepared "*by or for*" any members of the board or the shareholders' meeting as well as copies of documents "*received by*" those individuals. Accordingly, the requirement to submit internal documents may now also catch externally prepared market analyses, reports, studies, surveys, presentations and any comparable documents that are received by members of the board or the shareholders' meeting.

Second, new wording appears in the revised notification forms requiring notifying parties to present information not only on the relevant product and geographic market definitions which the parties put forward but also on "*plausible alternative*" product and geographic market definitions. The Commission specifies that "plausible alternative product and geographic market definitions can be identified on the basis of previous Commission decisions and judgments of the Union Courts and (in particular where there are no

19. See Commission MEMO/13/1098, *supra* note 14 (responding to criticism voiced in relation to this requirement during the public consultation, the Commission has stated that it "certainly does not want to look at a company's entire internal M&A track record [...]. Documents that are completely unrelated to the notified transaction do not have to be provided. Documents that are relevant are those that analyse the transaction that is notified in relation to alternative acquisitions.").

Commission or Court precedents) by reference to industry reports, market studies and the notifying parties' internal documents."²⁰

II. *POST-FILING DOCUMENT PRODUCTION BY THE NOTIFYING PARTIES*

A. *Requests for Information*

According to Article 11 of the EU Merger Regulation ("EUMR"), the Commission has the power to request information by simple request or by decision from the notifying parties and other undertakings. The distinction between a simple request for information and a request by decision is particularly important when assessing the consequences of not supplying information within the required time limits. Failure to respond to a request by decision may give rise to fines and/or periodic penalty payments.²¹

As explained under Part I.A above, it has become customary over the years for the merging parties to engage in pre-notification consultations with the Commission. The Merger Best Practices explain that the early submission of information relating to all potentially affected markets and possible competition concerns, copies of internal documents that are to be provided with the notification form, and any elements demonstrating efficiency claims that the parties propose to make ". . . may avoid requests for additional information from the notifying parties at a late stage in the procedure and possible declarations of incompleteness. . . ."²²

In many earlier cases, pre-notification discussions—together with the provision of a substantially complete draft notification (or of multiple drafts depending on the complexity of the case) for the case team to review and comment on—ensured that, upon formal filing, notification forms contained to a large extent all information deemed necessary by the case team to assess the concentration. As a result, the number and breadth of Article 11 information requests for the notifying party received after the effective notification date were relatively limited.

The extent of the information to be provided by the parties for the purpose of notifying a merger to the Commission has considerably

20. Revised Form CO, *supra* note 10, § 6.

21. EUMR, *supra* note 1, arts. 14(1)(c), 15(1)(a).

22. Merger Best Practices, *supra* note 9, ¶ 16.

developed over the years, as detailed under Part I.B above. As a result, pre-notification discussions have become lengthier and notification forms increasingly more detailed. Despite this, the merging parties may sometimes face detailed information requests after formal submission of a Form CO. Such requests may subject the notifying parties to data-gathering exercises to be completed within very short deadlines, generally a couple of days. Requests to provide further internal documents have become particularly burdensome as they are typically increasingly broadly defined (generally calling for production across several years) and most often not tied to any particular custodian. In most cases, it remains for the notifying parties to delineate themselves the scope of the documents to which access must be given and to identify likely custodians from which to download e-mail folders and collect hard copy documents through site visits. As an illustration of this, we cite below two sample requests for the production of internal documents on which we have assisted notifying parties.

The first example is: “Please provide all internal documents, including briefings, e-mails, memos of meetings, presentations, for the past two years . . . , and external documents discussing: . . .” This document collection request was made during Phase II proceedings and was one of many questions included in an Article 11 request for information. Eight topics were listed in relation to which the documents were to be provided over a two-year time frame.

The second example is: “Please submit for the below mentioned products for the EEA and for the [affected] markets (as indicated in the 6(1)c decision): All analyses, memorandums, reports, reviews, presentations of any format, performed either internally or by third parties (such as external consultants or financial institutions), and used in preparation, in the realization, and follow-up of the decision making process or reporting related to these products.” This document collection request was also made during Phase II proceedings. No time frame was specified as regards the creation of the requested documents. There were many affected markets listed in the Article 6(1)(c) decision. The deadline to respond was seven days.

B. “Stop-the-Clock” and Declarations of Incompleteness

There are various means by which the strict statutory deadlines for the Commission to review a notified transaction under the EUMR

may be suspended or reset, including declarations of incompleteness and “stop-the-clock” mechanisms.

In the event that the Commission discovers after formal notification that the information contained in the (Short) Form CO is incomplete in any material respect, it will give the parties an opportunity to urgently rectify such omissions before a declaration of incompleteness is adopted. The time permitted for such rectification is typically no longer than one or two days. However, if the Commission finds that the omissions immediately hinder the proper investigation of the proposed transaction, it will adopt a declaration of incompleteness (or the parties may withdraw the notification). In such a case, the notification will only become effective, and the Phase I deadlines will only start to run, on the date on which the complete information is received by the Commission.²³

Further, at any point during Phase I or Phase II, the clock may be stopped where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or order an inspection by decision pursuant to Article 13.²⁴

Given that most merger filings are preceded by a lengthy and detailed pre-notification phase, the aim of which is to ensure that the notification form is complete, the use of the stop-the-clock provision and declarations of incompleteness is relatively exceptional, as explicitly mentioned in Article 10(4) itself. However, they may occur in some cases. For example, the recent Zimmer-Biomet merger,²⁵ notified to the Commission on 3 June 2014, was declared incomplete on 11 June 2014, supposedly because the parties filed with no or little pre-notification discussions.

It is also interesting to note that while decisions to stop the clock in order to seek additional information from the parties traditionally occur in the early stages of a Phase II probe (i.e. when the Commission is engaged in intensive information gathering), in more recent reviews the Commission has stopped the clock at a later stage of its investigations, after entering into remedy discussions with the merging parties. This is generally aimed at giving the Commission additional time to assess in greater depth the remedy package. A stop-

23. Implementing Regulation, *supra* note 3, art. 5(2); Merger Best Practices, *supra* note 9, ¶ 23; EUMR, *supra* note 1, art. 10(1).

24. EUMR, *supra* note 1, art. 10(4).

25. See Commission Decision No. COMP/M.7265 (*Zimmer/Biomet*), (ongoing).

the-clock decision at such a late stage of the procedure was adopted in the context of the Commission's reviews of Telefónica's purchase of E-Plus (approved subject to conditions)²⁶ and Hutchison's acquisition of O2 Ireland (cleared by the Commission subject to conditions).²⁷ More recently, in the context of its ongoing review of Liberty Global's planned acquisition of Ziggo, the Commission also decided to stop the clock after having received and market-tested the remedies offered by Liberty Global.²⁸

C. Impact of the Merger Simplification Package

As described under Part I.C above, a number of changes included in the Merger Simplification Package may prove more burdensome for parties looking to file a merger notification with the Commission. This is particularly the case as regards the amendments to section 5.4 of the revised Form CO (and the insertion of a similar requirement to provide internal business documents in the revised Short Form CO), and the requirement for the notifying parties to present (and thus describe in detail) "all plausible alternative product and geographic market definitions."

While such amendments undoubtedly have the potential to increase the amount of information exchanged with the case team during pre-notification and provided in the notification form, they may reduce the number and volume of requests for additional information addressed to the parties—whether informally or pursuant to Article 11 of the EUMR—after the effective notification date.

However, other revisions are a clear indication that the Commission reserves the right to request further information from the notifying parties at any time. This is the case even in relation to sections of the Form CO and Short Form CO that the Merger Simplification Package aims to streamline. For example, although the requirement to provide contact details for the five largest independent suppliers to the parties to the concentration has been removed from the revised Form CO, the Commission has highlighted in a new footnote that it may at any time request additional contact details for any category of market participants, whether identified or not in the

26. See Commission Decision No. COMP/M.7018 (*Telefónica Deutschland/E-Plus*), (July 2, 2014).

27. See Commission Decision No. COMP/M.6992 (*Hutchison 3G UK/Telefónica Ireland*), (May 28, 2014).

28. See Commission Decision No. COMP/ M.7000 (*Liberty Global/Ziggo*), (ongoing).

revised Form CO. The revised notification forms also expressly state that information that the Commission has waived during the pre-notification phase may nonetheless be subsequently required from the notifying parties.²⁹

III. MARKET TESTING BY THE COMMISSION

The Commission actively engages in so-called “market testing” in order to verify and supplement the information collected from the notifying parties. The Commission is given wide powers to seek qualitative and quantitative data from, and the views of, a wide range of market players, in particular customers, competitors and suppliers. Further, where remedies are offered, the Commission will market-test them with third parties, generally those who have been most active in providing information during the investigation or have expressed a desire to be consulted.

The Commission’s investigative powers were enhanced during the 2004 merger reform to broadly align them with those available under Council Regulation 1/2003 for Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).³⁰ In order to carry out the duties assigned to it by the EUMR, the Commission is vested with the powers to request information,³¹ to conduct all necessary inspections of undertakings and associations of undertakings,³² and to impose fines and periodic penalty payments for breach of the obligations under the EUMR.³³

The most common tool to gather evidence is through written requests for information, which are typically sent nowadays by way of e-questionnaires and may be followed by supplementary calls and/or formal and informal third-party (telephone) interviews with a view to clarifying responses and gathering further information. Over the years, there has been a creeping increase in the length and detail of questionnaires sent to market participants, mainly customers of the notifying parties and to a lesser extent their (actual or potential)

29. Revised Form CO, *supra* note 10, Introductory Part, point 1.4(g); Revised Short Form CO, *supra* note 10, Introductory Part, point 1.6(g).

30. Council Regulation No. 1/2003/EC on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L1/1 (now Articles 101 and 102 TFEU).

31. *See* EUMR, *supra* note 1, art. 11; *see also supra* Part II.A (the Commission may require information by simple request or by decision).

32. EUMR, *supra* note 1, art. 13.

33. *Id.* arts. 14, 15.

competitors and suppliers. Further, many such requests go unanswered or are answered in a very summary fashion. In particular, responses are often limited to a mere “yes” or “no” without any reasons provided to substantiate them, and they are thus of little value to the Commission’s investigation. For instance, one might question the robustness of findings that are based on statements such as: “the majority of the respondents to the market test consider that . . .” or “9 out of 17 respondents state that. . . .” As regards the written questionnaires, the Commission has held on several occasions that:

[I]t is important to note that the market investigation is by no means an opinion poll. For instance, the fact that the majority of third parties provide a similar opinion in reply to a specific question, can only be an indication for the Commission’s own investigation, not a foregone conclusion. Likewise, it would not be appropriate to assume that the answers to the questionnaires can always be considered to be fully informed and objective. The specific level of knowledge of respondents might vary, the questions might have been misunderstood, the replies might be more or less representative, and the opinion provided might be biased to influence the Commission’s decision-making process in a certain way.³⁴

The following cases are particularly revealing in that regard. First, as part of the Commission’s market investigation into the proposed acquisition of MAN by Volkswagen,³⁵ many questionnaires were sent to a wide range of market participants. More than 1,000 questionnaires were sent to truck customers, of whom only around fifteen percent responded. Only a small number of customers (12% of the respondents) indicated that prices could rise after the merger. Half of these customers were based in national markets where the combined market share of the notifying parties in the overall heavy truck market would be below thirty-five percent. The remaining customers did not substantiate their claims.

Second, in the proposed merger between Deutsche Börse and NYSE Euronext,³⁶ which was ultimately blocked by the Commission,

34. See Commission Decision No. COMP/M.6663, (*Ryanair/Aer Lingus III*), ¶ 28 (Feb. 27, 2013); see also Commission Decision No. COMP/M.4439 (*Ryanair/Aer Lingus*), ¶ 39 (June 27, 2007); Commission Decision No. COMP/M.6314 (*Telefónica UK/Vodafone UK/Everything Everywhere/JV*), ¶ 23 (Sept. 4, 2012).

35. Commission Decision No. COMP/M.6267 (*Volkswagen/Man*), (Sept. 26, 2011).

36. Commission Decision No. COMP/M.6166 (*Deutsche Börse/NYSE Euronext*), (Feb. 1, 2012).

the case team conducted a wide-reaching market investigation. In this context, in the first phase, the Commission sent over 600 detailed Article 11 requests for information covering seven different groups of market participants, of which only approximately 250 responses were received. In the second phase, over 150 questionnaires were sent to targeted market participants, of which only around 100 responses were received. Further, more than twenty teleconferences and meetings were conducted with a range of customers and competitors.

Third, in Universal's proposed acquisition of EMI's recorded music business,³⁷ which was cleared subject to conditions, the Commission launched a market test of the commitments submitted by the notifying party, by sending 238 questionnaires to both customers and competitors of the notifying party. In the words of the Commission itself, "a number of customers provided very rudimentary (and therefore not very meaningful) replies to the market test questionnaire, essentially limited to answering yes or no to specific questions without providing any explanation of the reasons supporting their reply."³⁸

Fourth, in the context of Outokumpu's proposed acquisition of Inoxum,³⁹ which was approved subject to conditions, the Commission carried out an extensive market investigation both in Phase I and II. Overall, it sent out 2,251 questionnaires to customers (including distributors) of the notifying parties and fifty questionnaires to their competitors, and conducted a significant number of interviews with a number of third parties. The Commission also market-tested the commitments submitted by the parties by means of eight sets of questionnaires as well as a number of telephone calls.

In terms of inspections carried out by the Commission, the acquisition of MWM by Caterpillar in October 2011 is particularly interesting. Inspections pursuant to Article 13(4) of the EUMR were carried out at the premises of CAT in the United Kingdom and of MWM in Germany, and were continued at the Commission's premises in Brussels.⁴⁰ Those inspections, which lasted six days, were undertaken because the Commission had indications that the parties might have: (i) provided misleading information in response to

37. Commission Decision No. COMP/M.6458 (*Universal Music Group/EMI Music*), (Sept. 21, 2012).

38. *Id.* at n. 497.

39. Commission Decision No. COMP/M.6471 (*Outokumpu/Inoxum*), (Nov. 7, 2012).

40. Commission Decision No. COMP/M.6106 (*Caterpillar/MWM*), ¶ 14 (Oct. 19, 2011).

Article 11 information requests; (ii) provided misleading information in the notification of the proposed concentration; and (iii) implemented the notified concentration before it had been cleared by the Commission in contravention of Article 7(1) of the EUMR.

Site visits to the manufacturing or other facilities of the parties to the concentration, their competitors, customers and/or suppliers may also sometimes be undertaken by the Commission. For example, as part of its extensive market investigation into the proposed concentration between Outokumpu and Inoxum, the Commission organized a site visit to Outokumpu's premises in Finland and to one of the parties' major customers in the Netherlands in order to gain a better understanding of the industry in which the transaction was to take place.⁴¹

Customer surveys are also occasionally used in merger control cases to help define the relevant (product and geographic) market(s) and assess competition within them.⁴² For example, in Ryanair's first attempt to acquire Aer Lingus, which was prohibited in June 2007, the Commission conducted a customer survey at Dublin Airport primarily for the purpose of obtaining a representative sample of responses from customers who departed from Dublin to test Ryanair's claim that, from the perspective of the customer, Aer Lingus and Ryanair do not compete with each other. The Commission explained that such a survey was necessary to gather the views of affected individual customers (i.e. approximately 14 million passengers traveling with the merging parties) which, unlike so-called "business customers," could not be contacted by the Commission by way of the classic investigative techniques (questionnaires, telephone interviews) in a meaningful way.⁴³

Further, where the Commission believes it is desirable, in the interests of the fact-finding investigation, to hear in a single forum the opposing views that have been put forward by the notifying parties and third parties as to key market data and characteristics and the effects of the concentration on competition in the markets concerned,

41. Commission Decision No. COMP/M.6471 (*Outokumpu/Inoxum*), ¶ 114 (Nov. 7, 2012).

42. See Ian Thompson & James Harvey, *When to Pop the Question(s)? The Use of Surveys in Merger Control*, 35 EUR. COMPETITION L. REV. 92 (2014). These authors argue that "a survey will give the best results if it mimics the environmental and product characteristics of the market." *Id.*

43. Commission Decision No. COMP/M.4439 (*Ryanair/Aer Lingus*), ¶¶ 35-36, Annex I (June 27, 2007).

it may decide to invite them to “triangular” meetings. Such triangular meetings are on a voluntary basis and in addition to bilateral meetings between the Commission and the notifying parties, other involved parties or third parties.⁴⁴ However, to date, the use of triangular meetings as an investigatory instrument has been somewhat limited.

IV. *AN INCREASING USE OF ECONOMIC ANALYSES*

In addition to gathering an increasing amount of internal documents and similar evidence from the notifying parties and (more rarely) third parties, economic analyses, including modeling when appropriate, have become more widely used in European merger control, especially but not exclusively in the more complex cases.⁴⁵ In this regard, it is worth noting that the Merger Simplification Package has included in the revised Form CO a non-binding request for economic data in cases in which quantitative economic analysis for the affected markets is likely to be useful.⁴⁶ While such information is not required for the Form CO to be considered complete, the notifying parties are nevertheless encouraged to provide the data as early as possible, particularly in light of the strict statutory deadlines for Union merger control.

A number of elements have contributed to an increasing use by the Commission of economics to define markets and analyze their functioning, assess closeness of competition, predict the likely (price) effects of mergers, validate efficiency claims or predict the impact of remedies, as well as to generate evidence through a range of empirical techniques. The following elements are particularly noteworthy in that regard:

First, in 2003, the economic capabilities of DG Competition were enhanced, in particular through the appointment of the Chief Competition Economist (“CCE”). The CCE, currently Professor Massimo Motta, is part of DG Competition and assists in evaluating the economic impact of its actions. The Chief Economist Team (“CET”), headed by the CCE, is composed of over twenty specialized economists, many of whom hold a Ph.D. in industrial organization. The main tasks of the CCE and his office are: (i) to provide independent guidance on methodological issues of economics and

44. See Merger Best Practices, *supra* note 9, ¶¶ 38, 39.

45. See OECD Policy Roundtable, *supra* note 2, at 245-60.

46. Revised Form CO, *supra* note 10, Introductory Part, point 1.8.

econometrics in the application of EU competition rules; (ii) to provide general guidance in individual competition cases from their early stages; (iii) to provide detailed guidance in the most important competition cases involving complex economic issues and requiring sophisticated quantitative analysis; and (iv) to contribute to the development of general policy instruments with an economic content, as well as assist with cases pending before the Community Courts.⁴⁷

Second, as part of the 2004 merger reform, the previous substantive merger test based on the creation or strengthening of dominance was replaced by a *significant impediment to effective competition* (“SIEC”) test. Further, guidelines on the assessment of horizontal mergers⁴⁸ and non-horizontal mergers⁴⁹ were adopted in 2004 and 2008, respectively.

Third, in October 2011, the Commission published best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases (“Economic Best Practices”).⁵⁰ The Economic Best Practices, which are guided by a desire to ensure transparency and accountability, provide practical guidance on: (i) the content and presentation of economic or econometric analysis in order “to facilitate its assessment and the replication of any empirical results by the Commission and/or other parties,” and (ii) how to respond to Commission requests for quantitative data “to ensure that timely and relevant input for the investigation can be provided.”⁵¹ On the latter point, the Economic Best Practices place great emphasis on the usefulness of early consultation with the Commission on the availability of quantitative data. Such early consultation will allow one to determine not only what data is available and its suitability, but also in what form it can be provided, thereby facilitating the provision of the data should the Commission make a data request.⁵² Further, the

47. See Lars-Hendrik Röller & Pierre A. Buigues, The Office of the Chief Competition Economist at the European Commission (May 2005) (providing a more detailed description of the role of the CCE and his office).

48. Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. C 31/5.

49. Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2008 O.J. C 265/6.

50. Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases (DG Competition Staff Working Document, Oct. 2011) [hereinafter Economic Best Practices].

51. *Id.* ¶ 5.

52. *Id.* ¶¶ 73-76.

Economic Best Practices stress the importance of cooperation in good faith between the parties and the Commission in order to help both sides deal more efficiently with data issues.⁵³

The types of data used by the Commission for its quantitative economic analysis in merger cases vary depending on the specificities of the market(s) and data availability. This data is most commonly collected from industry sources or from companies themselves. The following are examples of types of economic data that the Commission has deemed useful in recent merger cases:⁵⁴

First, where a concentration between producers of retail products that are sold to end-consumers takes place, “retail scanner data” is often available, in particular via market research companies such as Nielsen. Such transaction data about consumers’ purchases in a representative sample of stores and over a significant period of time can prove useful on a number of fronts. For example, the product classifications contained in these datasets may provide first proxies of the relevant market segmentations in the industry. Such market data may also furnish useful information on the price positioning of the parties’ brands and the competitive constraints exerted by the parties on each other. Further, as it is typically readily available, retail scanner data can be used to rapidly check the arguments put forward by the parties and other market participants. A recent case in which scanner data has been relied on by the Commission is the *Unilever/Sara Lee* merger, which was cleared subject to conditions. This case is particularly noteworthy in that the Commission conducted a merger simulation by its own economists in order to predict the likely impact of the proposed transaction on the deodorant markets.⁵⁵

Second, “bidding data” may prove particularly useful in assessing a concentration between providers of services that business customers purchase through structured procurement processes where candidate suppliers bid against each other. Where such data is available and is representative (in the sense that it covers a large enough sample of tenders/bids), its analysis will likely provide

53. *Id.* ¶¶ 71-72.

54. See OECD Policy Roundtable, *supra* note 2, at 248-59; see also Revised Form CO, *supra* note 10, Introductory Part, point 1.8.

55. Commission Decision No. COMP/M.5658 (*Unilever/Sara Lee*), (Nov. 17, 2010). For the merger simulation conducted in that case, see in particular the Technical Annex to the decision. See also Commission Decision No. COMP/M.5644 (*Kraft Foods/Cadbury*), (Jan. 6, 2010).

valuable information on the closeness of competition between the parties. Recent cases in which bidding data was gathered and analyzed by the Commission to assess the competitive constraint exerted by the parties on each other include the *Baxter International/Gambro* merger,⁵⁶ which was approved subject to conditions, as well as the *Siemens/Invensys Rail* concentration,⁵⁷ which the Commission also approved.

Third, data on customer switching may be particularly relevant for the purpose of assessing closeness of competition. Upward pricing pressure (“UPP”) measures make it possible to estimate the extent to which the merged firm would have the incentive to raise prices post-merger given, in particular, prices, margins and diversion ratios observed in the market. However, the extent to which such measures will yield valuable results is inherently a function of the reliability of the inputted data, particularly the diversion ratio measure used in the UPP analysis. Further, such measures must not be reviewed in isolation but rather in the context of other pieces of empirical evidence.⁵⁸ A UPP-type exercise was conducted, for example, by the Commission in the *Hutchison 3G Austria/Orange Austria* merger,⁵⁹ which was cleared subject to conditions.

As emphasized in the Economic Best Practices,⁶⁰ it is critical to ensure that quantitative analysis is used only in those cases for which sufficient accurate data exists and can be gathered and analyzed in a timely fashion so as to generate meaningful results, while at the same time reducing the burden on the involved parties and the Commission posed by the production and processing of such data. In this regard, it is worth noting that even though the Commission increasingly relies on econometric evidence in merger control, it has on a number of occasions considered that conducting a quantitative economic analysis was not appropriate in a given case. For example, in its investigation into the proposed merger between Deutsche Börse and NYSE Euronext, which was ultimately prohibited, the Commission

56. Commission Decision No. COMP/M.6851 (*Baxter International/Gambro*), (July 22, 2013).

57. Commission Decision No. COMP/M.6843 (*Siemens/Invensys Rail*), (Apr. 18, 2013).

58. See OECD Policy Roundtable, *supra* note 2, at 255-56 (regarding UPP-type exercises).

59. Commission Decision No. COMP/M.6497 (*Hutchison 3G Austria/Orange Austria*), (Dec. 12, 2012). The exact test used by the Commission in this case is the “gross upward pricing pressure index” (“GUPPI”) test, which is a spin-off of the UPP test.

60. See Economic Best Practices, *supra* note 50, ¶¶ 51-52.

concluded that “conducting any empirical analysis, in particular for market definition purposes, would not have been meaningful given the lack of suitable data required for those purposes.”⁶¹ Also, in the assessment of the proposed creation of a joint venture between Vodafone, Telefónica and Everything Everywhere in the field of mobile commerce in the UK, the Commission considered that “[g]iven the nascent state of the markets under consideration, there is limited data available and therefore no extensive empirical analysis could be undertaken.”⁶² Further, while in *Ryanair/Aer Lingus* the available quantitative data was deemed sufficiently complete, accurate and adequate to enable the Commission to conduct a thorough empirical analysis (including two sets of regression analysis to identify the level of competitive constraints exercised between the parties and by their competitors as well as a price correlation analysis),⁶³ this was not the case in *Olympic/Aegean Airlines*.⁶⁴ In the context of the investigation related to the latter transaction, the Commission clearly laid out the pre-conditions that need to be met for a sophisticated empirical analysis to be informative:

- (i) All the necessary data must be available to implement the chosen empirical methodology and the available data must be of adequate quality, otherwise the significance of the results obtained is at most very limited; (ii) Empirical analysis in merger cases necessarily involves the use of historical data. Thus, the data to be usable in such analyses need to be a good indicator of the likely impact of the merger on future competition; and (iii) The sufficient variability in the data to identify references for comparison.⁶⁵

61. Commission Decision No. COMP/6166 (*Deutsche Börse/NYSE Euronext*), ¶ 251 (Feb. 1, 2012).

62. Commission Decision No. COMP/M.6314 (*Telefónica UK/Vodafone UK/ Everything Everywhere/IV*), ¶ 20 (Sept. 4, 2012). However, the Commission did consider and assess a numerical analysis of foreclosure incentives submitted by the notifying parties.

63. Commission Decision No. COMP/M.4439 (*Ryanair/Aer Lingus*), ¶ 34, Annexes III, IV (June 27, 2007).

64. Commission Decision No. COMP/M.5830 (*Olympic/Aegean Airlines*), (Jan. 26, 2011). Note that Aegean’s first attempt to merge with Olympic in 2011 was blocked by the Commission. However, the Commission subsequently approved the merger in 2013. See Commission Decision No. COMP/M.6796 (*Aegean/Olympic II*), (Oct. 9, 2013) (not yet published).

65. Commission Decision No. COMP/M.5830 (*Olympic/Aegean Airlines*), ¶ 30 (Jan. 26, 2011).

Finally, it is also interesting to note that in a number of recent merger cases, the Commission's market investigation has included a so-called "market reconstruction" exercise. In particular, in several cases, the Commission has sought to reconstruct the market shares of the main players for some affected product categories or countries in order to aid in its assessment of the notified transaction's compatibility with the common market. For example, in its Phase II investigation of the *Johnson & Johnson/Synthes* merger, the Commission reconstructed market shares in more than 50 product markets in 30 countries in order to verify the accuracy of the parties' estimates as the market data provided by the parties was deemed not reliable in some instances.⁶⁶ This resulted in the creation of a model, producing market share data for the parties and a considerable number of competitors, per product and geographic market.⁶⁷ Market reconstructions were also conducted, for example, in the acquisition of Pride Foods (Gerber Emig) by Refresco (cleared subject to conditions),⁶⁸ in the *US Airways/American Airlines* merger (approved subject to conditions),⁶⁹ in the *Cisco/Tandberg* merger (cleared subject to conditions),⁷⁰ and in the acquisition of Varian by Agilent (approved subject to conditions).⁷¹

V. "DATA ROOM" PROCEDURE

As a result of the growing use by the Commission of economic analysis, econometric tools and market reconstruction in European merger control, notifying parties have increasingly requested that the data, as well as the aggregating tools (e.g. Microsoft Excel spreadsheets) and models on which the Commission has based its assessment be disclosed to them in order to verify the veracity and accuracy of the Commission's analysis and the nature of the underlying data. In particular, notifying parties typically want to test the Commission's approach in at least four respects. First, the choice

66. Commission Decision No. COMP/M.6266 (*Johnson & Johnson/Synthes*), § 6.1.2 (April 18, 2012).

67. See Final Report of the Hearing Officer in Case COMP/M.6266 (*Johnson & Johnson/Synthes*), ¶ 4 (Apr. 3, 2012).

68. Commission Decision No. COMP/M.6924 (*Refresco Group/Pride Foods*), (Oct. 4, 2013).

69. Commission Decision No. COMP/M.6607 (*US Airways/American Airlines*), (Aug. 5, 2013).

70. Commission Decision No. COMP/M.5669 (*Cisco/Tandberg*), (Mar. 29, 2010).

71. Commission Decision No. COMP/M.5611 (*Agilent/Varian*), (Jan. 20, 2010).

and quality of raw data selected for analysis. Second, the methods for aggregating that data to incorporate it into models and analyses. Third, the models used to “crunch” the data and the analysis of it. Fourth, whether data has been accurately transferred from models to Statements of Objections (“SOs”) and other documents produced by the Commission.

The Economic Best Practices provide that “[w]hen granting access to the file, the Commission may provide upon request the data and codes underlying its final economic analysis or, to the extent that they have been made available to the Commission, that of third parties on which it intends to rely or take into account.”⁷² One of the barriers to such access is the often confidential nature of the data, which will typically have been provided by competitors of the notifying parties and/or by other market participants. In order to manage this conflict between respect for confidentiality and the rights of defense of the notifying parties, the Economic Best Practices provide that “[w]here necessary to protect the confidentiality of other parties’ data, access to the data and codes will be granted only at DG Competition premises in a so-called data room procedure, subject to strict confidentiality obligations and secure procedures.”⁷³

The Commission’s Hearing Officers act as an independent arbiter where a dispute about the effective exercise of procedural rights between parties and DG Competition arises in antitrust and merger proceedings. They are frequently involved in decisions as to whether the data room procedure is in a given case the most appropriate tool to reconcile confidentiality requirements with considerations relating to the right to be heard.⁷⁴

Under the data room procedure,⁷⁵ which needs to be adjusted to the specifics of each case, part of the file, including confidential information, is gathered in a physical data room at the Commission’s

72. Economic Best Practices, *supra* note 50, ¶ 47.

73. *Id.*

74. See Decision of the President of the European Commission No. 2011/695/EU on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings, 2011 O.J. L 275/29, Chapter 4.

75. The Commission indicates that the data room procedure is along the same lines as that used in antitrust cases. See Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, 2011 O.J. C308/6, ¶¶ 97-98; see also European Commission, DG Competition Antitrust Manual of Procedures, Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU, Chapter 12, ¶¶ 111-119 (Mar. 2012).

premises. Access to the data room is granted to a restricted group of persons, usually economic advisors of the notifying parties and in some cases external legal counsel.⁷⁶ The economic advisors and external legal counsel of the notifying parties that access the data room are required to sign a confidentiality agreement. They may produce a final report on the information contained in the data room but may not disclose any confidential information to their client.

The importance of access to data used by the Commission for economic analysis and market reconstruction has been highlighted by numerous cases in which scrutiny of such data has been found to be wanting. These cases underline the importance of notifying parties' ability to check the Commission's use of economic analysis, from the raw data used all the way through to the transfer of data to the SO.

It is not unusual that a discussion may arise over the extent of access to be granted. For example, in *Universal/EMI*,⁷⁷ Universal requested that the Hearing Officer amend the procedural rules governing the use of the data room.⁷⁸ In particular, it argued that its rights of defense would be violated because: (i) the scope of the disclosure was too narrow as it would not allow access to the raw data and relevant codes that were used to build the final datasets on which the CET's economic analysis was run; (ii) specific provisions in the rules restricting the use of the data would prevent Universal's economic advisors from properly verifying the CET's analysis; and (iii) the anonymization of the CET data would prevent the economic advisors from understanding the specific factual context in which the data was generated. In response, the Hearing Officer amended the data room rules to ensure "that all raw data and codes would be included in the data room" and to allow Universal's economic advisors "to conduct the tests and verifications of the CET's analysis

76. Practice seems to vary between cases. For example, in *Johnson & Johnson/Synthes*, the Hearing Officer granted access to the data room to both the legal and economic advisors of the notifying parties, while in *Universal Music Group/EMI Music*, access was limited to external economists. See Commission Decision No. COMP/M.6458 (*Universal Music Group/EMI Music*), (Sept. 21, 2012) and Final Report of the Hearing Officer in Case COMP/M.6458 (*Universal Music Group/EMI Music*), (Sept. 11, 2012).

77. Commission Decision No. COMP/M.6458 (*Universal Music Group/EMI Music*), (Sept. 21, 2012).

78. See Final Report of the Hearing Officer in Case COMP/M.6458 (*Universal Music Group/EMI Music*), (Sept. 11, 2012); see also Dafydd Nelson, *Comment: Universal Merger Shows EU Data-Access Rules Can Be Eased*, MLEX (2013).

indicated in the letter.”⁷⁹ It also accepted limited disclosure of the confidential version of one of the economic advisors’ data room reports containing information used to calculate royalty figures of the parties. But the Hearing Officer considered that it was not indispensable to lift the anonymization of the data that contained sensitive business secrets. Further, it refused to grant full access to adverse quantitative analysis and to admit Universal’s legal advisors to the data room. This case is also interesting in that it shows that notifying parties are unlikely to be granted access to third-party data collected and used by the Commission prior to the issuance of the SO.

CONCLUSION

The scope of the information and data gathering in a merger investigation varies depending on the complexity of the case and the resources available. However, ever since the early days of the Merger Regulation, there has been a creeping increase in the range of information required to be provided by the merging parties in pre-notification and in notification form, as well as in the volume and detail of data sought from the notifying parties, other involved parties and third parties (primarily customers, suppliers and competitors) through information requests, inspections, bilateral and triangular meetings, (telephone) interviews, customer surveys and other investigatory tools. In particular, the Commission has become much more demanding in relation to internal documents, often required to be produced by the notifying parties across several years. There has also been a significant rise in the use of economic analysis and econometric tools in European merger control.

79. Final Report of the Hearing Officer in Case COMP/M.6458 (*Universal Music Group/EMI Music*), ¶ 11 (Sept. 11, 2012).